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THIRD TRIENNIAL REPORT

OF THE

PROVINCIAL JUDGES REMUNERATION

COMMISSION

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PROVINCIAL JUDGES
Remuneration Commission

Commission de rémunération
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May 26, 1997

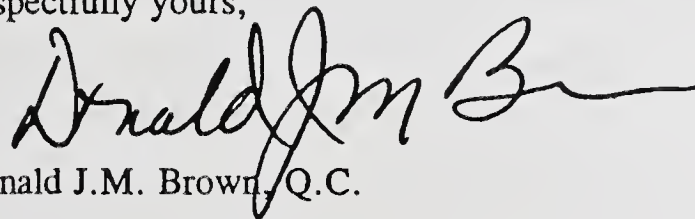
Chair
Management Board of Cabinet
12th Floor, Ferguson Block
77 Wellesley Street West
TORONTO, Ontario
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Dear Sir:

MAE

Pursuant to the *Courts of Justice Act*, 1994, R.S.O. 1990, c.43, s.51.13, and Appendix "A" to the Framework Agreement, the Third Provincial Judges Remuneration Commission has the honour of presenting its unanimous conclusions and recommendations with respect to the remuneration, allowances and benefits of Provincial Court judges in Ontario. The recommendations relate to a time period commencing May 1, 1996.

Respectfully yours,


Donald J.M. Brown, Q.C.


Mary Eberts


Valerie A. Gibbons

THIRD TRIENNIAL REPORT PROVINCIAL JUDGES REMUNERATION COMMISSION

INTRODUCTION

This report is the third triennial report of the Provincial Judges Remuneration Commission, albeit delayed by agreement between the Provincial Judges and Government of Ontario.

This Commission was constituted pursuant to Section 51.13 of the *Courts of Justice Act* and the Framework Agreement set out in the Schedule to that Act which governs both the constitution of the Commission and its operations. Prior to the making of that agreement in 1992, the predecessor Commissions reported in 1988 and 1992 as to the remuneration and benefits of the Judges of the Ontario Court (Provincial Division). Appendix B of the Framework Agreement established the annual salary of a Judge at \$124,250.00. As well, the agreement provided that the salary would be adjusted annually by the Industrial Aggregate wage index published by Statistics Canada. By agreement, however, the Judges waived the Industrial Aggregate adjustment to their salaries for 1993, 1994 and 1995.

The present Commission was constituted by Orders-in-Council in 1996 to review and establish salaries and benefits for the Judges effective April 30, 1996. By agreement between the parties, the time for receiving submissions and conducting the hearing was extended to January 26, 1997. Submissions in writing were received from counsel for the Government of Ontario and counsel for the three Judges' Associations: the Ontario Judges Association, the Ontario Family Law Judges Association and the Ontario Provincial Court (Civil Division) Judges Association. As well, one Judge made a written submission, and oral submissions were heard by the Commission in accordance with Section 21 of the Framework Agreement.

Those submissions were made in relation to the criteria set out in Section 25 of the Framework Agreement which provides as follows:



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25. The parties agree that the Commission in making its recommendation on provincial judges' compensation shall give every consideration to, but not limited to, the following criteria, recognizing the purposes of this agreement as set out in paragraph 2:

- (a) the Laws of Ontario;
- (b) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in the province and the overall state of the provincial economy;
- (c) the growth or decline in real per capita income;
- (d) the parameters set by any joint working committees established by the parties;
- (e) that the Government may not reduce the salaries, pensions or benefits of Judges individually or collectively, without infringing the principle of judicial independence;
- (f) any other factor which it considers relevant to the matters in issue.

The purpose of the Framework Agreement referred to in Section 25 is as follows:

2. The purpose of this agreement is to establish a framework for the regulation of certain aspects of the relationship between the executive branch of the government and the Judges including a binding process for the determination of Judges' compensation. It is intended that both the process of decision-making and the decisions made by the Commission shall contribute to securing and maintaining the independence of the Provincial Judges. Further the agreement is intended to promote co-operation between the executive branch of the government and the judiciary and the efforts of both to develop a justice system which is both efficient and effective, while ensuring the dispensation of independent and impartial justice.

THE INITIAL SUBMISSIONS ON BEHALF OF THE JUDGES

The initial submissions on behalf of the Judges addressed three general remuneration issues: salary level, benefits and pension.

Salaries

The submissions in relation to salaries emphasized the fact that in light of the restraint policies of the Government, the Judges had waived their right to receive annual adjustments as provided by the Framework Agreement and that accordingly their salaries had been frozen since 1992 until April 1996.

It was pointed out that the Judges had lived up to the spirit and letter of their agreement. They had provided an additional 3000 sitting days in each year and had extended the freeze on their salaries for an additional year to April 30, 1996 which corresponded with the term of the Social Contract established by the previous Government.

In the result, while the caseload and workload of the Judges increased, that heavier caseload and workload was handled by a reduced complement of Judges, a fact noted by Chief Judge Sidney B. Linden in his report on the opening of the courts of Ontario on January 6, 1997. In his words, this has been possible partly "... because all the judges and justices of the peace ... pulled together and worked harder".

Counsel pointed out that in December, following a report by KPMG, salary increases were made to senior members of Government, specifically deputy ministers and assistant deputy ministers, which, at the midpoint of a deputy-minister's salary, represented an increase of approximately 18% not including the incentive bonus. Mr. French also noted that following the expiry of the Social Contract, the Ontario Public Service will enjoy increases

which could total 9-11% consisting of the restoration of the salary reduction of 5%, an increase due to progression through the ranks of 1%, and merit pay of between 3-5%.

In addition, in their submissions, the Judges compared their remuneration with lawyers' incomes over the past five years using published data collected by Price Waterhouse, the Canadian Lawyer and the Canadian Bar Association. It was submitted that lawyers in Ontario, apart from senior lawyers in Metro Toronto, enjoyed even greater increases than those in the Ontario Public Service and that if one totalled the difference between the Judges' income over those five years and those of senior lawyers, cumulatively, the shortfall approached \$500,000.00.

Finally, it was noted that the Scott Commission had recommended to the federal government that it phase in upward adjustments to correct the erosion of salary experienced by the federal judiciary as a result of the elimination of indexation. Commencing in 1997, if accepted, those recommendations would lead to an increase in salary for federal Judges from \$155,800.00 to \$168,264.00.

Accordingly, it was submitted that the Commission, at a minimum, ought to increase salaries to give effect to the erosion experienced by the Judges as a result of the foregone Industrial Aggregate index increases from either 1991 or 1992 which would result in an increase in a Judge salary to either \$139,300.00 or \$133,550.00.

Benefits

In addition to the foregoing, it was submitted that the Commission ought to address the following six benefits as part of the remuneration package for Judges:

- (1) As to short term sickness it was suggested that the Judges be entitled to 130 working days with full pay for reasons of illness or injury pursuant to sub-section 52(1) of O.Reg. 67/92.
- (2) As to long term disability it was submitted that a Judge be entitled to full pay until it is determined that the disability is permanent, in which case the Judge ought to be able to retire with a full pension.
- (3) As to vision care, it was submitted that the basic benefit should be increased to \$300.00 every two years and that for hearing impairment, the cost of hearing aids be borne by the government to a limit of \$1,000.00 with an annual amount of \$200.00 per year to cover the cost of repairs.
- (4) It was submitted that Judges be granted 25 as opposed to 17 weeks pregnancy leave.
- (5) It was submitted that sitting fulltime Judges 70 years or older should receive an amount equal to the annual salary of a Judge.
- (6) As to sabbaticals it was submitted that the Commission recommend the formation of a joint working committee to assist with this issue on the occasion of the Fourth Triennial Inquiry in 1998.

Pensions

The Judges presented a detailed written submission relating to pensions pointing out the differences that exist between the present pension arrangements and those enjoyed by federally appointed Judges. Their basic position was that the pension arrangements enjoyed by federally appointed Judges ought to be adopted for Provincial Judges.

THE SUPPLEMENTAL SUBMISSIONS OF THE JUDGES

On February 14, as a result of an announcement by the Government that the expected deficit would be smaller than originally estimated, the Commission sought further written submissions as to the relevance of this new financial information. Accordingly, the Commission was supplied with evidence of the new government financial data along with submissions from both the Judges and the Government as to the significance of this more recent information.

In the supplementary written submissions on behalf of the Judges it was pointed out that the Government's most recent economic projections were inconsistent with the Government's earlier evidence and submissions and that the new data gave even greater force to their initial submissions to the effect that the economy of Ontario had strengthened sufficiently to justify the requested increases to the Judges' remuneration.

SUBMISSIONS ON BEHALF OF THE GOVERNMENT OF ONTARIO

While the Government of Ontario, in both its written submissions and those made orally by counsel, addressed the same three subjects, namely, salaries, benefits, and pensions, the thrust of its comments were first, that it acknowledged the very significant and important contribution that the Judges have made and continue to make to the administration of Justice in Ontario and the Government expressed its appreciation for professionalism and leadership that the Judges have shown in performing their roles in difficult times, and second, that the Province of Ontario was in serious financial straits. Mr. Filion pointed out that the financial position of the Ontario Government with its high levels of debt and a continuing deficit of 8.2 billion for the current fiscal year was a crucial aspect of the prevailing overall state of the provincial economy.

Salaries

The Government pointed out that as a result of the AIW adjustment for 1996, effective April 1, 1996 a Judge's salary would be \$125,120.00 and that that it was fair and reasonable as contemplated by the Framework Agreement.

Counsel reviewed the economic conditions in Ontario and the steps being taken by the Government of Ontario to reduce its deficit and submitted that, at the present time, any increase beyond that triggered by the AIW would not be appropriate.

While acknowledging that the senior management group did receive increases following the KPMG study, the Government pointed out that the levels were between 5 and 15% below those recommended and that this increase was in the context of an overall reduction of the management group and was necessitated by a high rate of resignations in that group of employees. It was submitted that, conversely, there were many well-qualified applicants available to fill vacancies on the Provincial Court at the present salary level.

Counsel pointed out that progression through the ranks and merit pay were components of the OPS remuneration package before the Social Contract and that they were simply being restored along with the 5% reduction imposed three years ago. It was pointed out that at the same time, restructuring would lead to a substantial overall reduction to the wages paid to government employees.

The statistics as to lawyers incomes were criticized, particularly their incompleteness and unreliability. Moreover, it was pointed out that as a result of the amendments to the legal aid plan, practitioners of family and criminal law were actually facing falling rather than rising incomes. And, it was suggested that the level of salary of a Provincial Judge would compare favourably with the incomes of those practitioners if that information could be obtained.

Finally, counsel submitted that there were many groups in the OPS and broader public service who suffered wage freezes and who were not receiving so-called "catch-up" now. Furthermore, he emphasized the Government's commitment to restoring fiscal order to the Province of Ontario and that the Government was not singling out any group to bear more than its fair share of that burden.

Benefits

The Government submitted that the level of benefits for long term disability, pregnancy leave, and life insurance were adequate and in accordance with 1992 Triennial Report or general government standards. It was also submitted that reimbursement of \$200.00 every 24 months for vision care and reimbursement of \$200.00 for hearing aids was adequate in the context of the overall level of benefits enjoyed by the Judges. And, as to sabbatical leaves, the Government's submissions pointed out the expense that such a policy would lead to and made reference to the 1988 Report in that regard. In short, counsel submitted that the benefit levels were equal to or better than those enjoyed by the senior management group and that the appropriate course for the Commission was to leave the benefits at their present level.

Pension

As to the pension arrangements, the Government concurred with the alternate submission of counsel for the Judges, namely, that pensions be the subject of a joint working committee to assist subsequent Commissions since pension benefits must be looked at as a whole and not dealt with on a piecemeal basis.

SUPPLEMENTARY SUBMISSIONS ON BEHALF OF THE GOVERNMENT

The position of the Government was that while the projections released in February were different than those contained in the initial material in that the projected revenues

were higher and the deficit lower by some \$1.5 billion, these new projections were not inconsistent with its overall basic position that the fiscal condition of the province was not yet in a condition to warrant an increase beyond the AIW increase which it was intending to implement. In short, the position of the Government was that a \$7.7 billion deficit for the 1996/7 fiscal year was still so serious that any further pay increases would be inconsistent with the Government's fiscal objectives.

THE COMMISSIONS' CONCLUSIONS

From a review of the Reports of the First and Second Triennial Commissions and the exhibits and submissions of the Judges' Associations, His Honour Judge Caney, the Government of Ontario, and their counsel, the Commission has reached two general conclusions.

The first is that the role played by Provincial Judges, while it has always been important in the administration of justice in Ontario, has been becoming increasingly more so both as to the level of responsibility being thrust upon them and as a result of the increase in the caseload they have been required to carry. That became apparent from a review of the history of the Court set forth in the Reports and in the written submissions of the Judges' Associations. It is also common knowledge to those who practise in the fields of family and criminal law. And, given those circumstances, the course taken by the Judges over the past five years in discharging those increased responsibilities with the professionalism they have displayed, is both acknowledged and commended.

That being said, in the view of the Commission, particularly in light of the financial condition of the Government of Ontario, and notwithstanding the projection of a lower deficit than originally estimated for the present fiscal year, it would be inappropriate to add to the AIW increase in the salaries of the Judges of the Provincial Court. The economic health of the government, while improving, has not yet been restored to the point that a further increase

beyond the AIW increase can be justified. Others in public life are continuing to bear the cost of restraint and restructuring which is being experienced by our public institutions. Moreover, the present data notwithstanding, lawyers practising criminal law and family law are also experiencing the effect of reduced government spending. It may be, as some of the Government's more recent projections indicate, that it's fiscal condition will become stronger sooner than originally expected along with the improving state of the provincial economy. In our view, however, and while there are clear signs of that happening, it has not yet reached the point where the Government can reasonably be required to increase the compensation paid to the members of the Judiciary.

Accordingly, today, we are all of the view that a general salary increase beyond that already in place from the operation of the Framework Agreement is not warranted.

At the same time, this Commission shares the views expressed by the Scott Commission to the effect that if the present quality of justice in Ontario and the independence of the judiciary are to be maintained the apparent erosion in the overall financial position of the Judges must be reviewed again. We are all of the view, however, that this review should be carried out by the Fourth Triennial Commission to be struck in 1998. Moreover, given the pace of improvement in the provincial economy and, in particular, the improvement in the Government's financial condition, it would seem appropriate that the Fourth Triennial Commission inquire as to why a Judge's remuneration ought not be restored to the level that would have been achieved had the AIW increases not been voluntarily waived for the years following the Framework Agreement to 1996.

The rationale for annual AIW increases was to maintain the Provincial Judges' remuneration at a constant level. It has not happened as a result of the agreement of 1992. Accordingly, when the financial circumstances of the government improve sufficiently, *prima facie*, it would seem that the foregone AIW increases ought to be implemented to maintain the integrity of the 1992 Framework Agreement. Of course, other factors may very well come into

play and the Commission recognizes that it cannot pre-judge that question nor fetter the discretion of future Commissions. But, given the work of earlier Commissions and the agreement reached by the Government with the Judges in 1992, it is the view of this Commission that the Fourth Triennial Commission should receive submissions dealing with the question as to why there should not be restoration of the foregone AIW increases.

As well, as an aside, this Commission is of the view that the statistics in relation to the incomes of lawyers in private practice are unreliable. And, to the extent that they are relevant, if such statistics are to be relied upon, a method must be sought to develop better data. Accordingly, it is our recommendation that a joint working group be established to ascertain accurately the levels of income enjoyed by lawyers, particularly the net incomes enjoyed by family law and criminal law practitioners who regularly appear in the Provincial Court.

Finally, this Commission is of the view that the present pension arrangements need to be studied again. It may be that a pension that more closely approximates the pension benefits of federally appointed Judges would be appropriate. But again, in the present circumstances, and without the benefit of a thorough analysis, a change at this time is not appropriate. It is our further recommendation, however, that a joint study group be struck to study the Judges' pension arrangements with a view to providing the Fourth Triennial Commission with the appropriate information and advice to permit it to address all aspects of Provincial Judges' pension benefits.

